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Supreme Court of the United States

October Term, 1957

No. 126 Misc.

UNITED STATES *ex rel.* ELMER BURKE,

Petitioner,

v.

WILFRED DENNO,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Statement

This is a petition for a writ of certiorari to the United States Court of Appeals, Second Circuit, to review an order of that court, entered May 1, 1957, which unanimously affirmed an order of the United States District Court for the Southern District of New York, entered February 9, 1957, denying the petitioner's application for a writ of *habeas corpus*.

The petitioner's application for a writ of *habeas corpus* sought to secure his delivery from the custody of the respondent Denno, the Warden of New York State's Sing Sing Prison, where he is confined pursuant to a judgment of the Court of General Sessions, New York County, rendered December 16, 1955, which convicted him of the crime of MURDER IN THE FIRST DEGREE [*N. Y. Penal Law*, §1044, subd. 1], after a trial before MULLEN, J., and a special jury, and sentenced him to death (4574-5).*

This judgment was affirmed by the New York State Court of Appeals on July 11, 1956 (1 N. Y. 2d 876).

A stay of execution previously granted by the United States Court of Appeals is still in effect by mutual agreement of the parties herein.

In the event this petition is denied, the New York Court of Appeals must, on proper application, fix a new date of execution of the petitioner (see N. Y. Code Crim. Proc., §503).

Prior Proceedings

(a) Proceedings before trial

The petitioner was indicted by the New York County Grand Jury on July 1, 1954. The indictment charged that, on or about July 23, 1952, with malice aforethought, he shot and killed one Edward Walsh with a pistol (10-5).

The petitioner, who had left New York shortly after the shooting, escaped from jail in Boston in 1954, and was finally apprehended in South Carolina, and returned to New York on September 1, 1955 (2754-8, 2794, 2973-6, 3689-97, 3723).

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* References, unless otherwise indicated, are to folios of the printed record on appeal to the New York Court of Appeals.

On September 2, 1955, he appeared in the Court of General Sessions, and, after four attorneys had been assigned to defend him, was committed to the city prison (16-8). A week later, he was arraigned on the indictment and pleaded not guilty (*ibid.*) This plea was amended, during the trial, to include a specification of insanity (19, 2133-4).

On November 4, 1955, the petitioner, through counsel, moved for a change of venue or an adjournment, on the basis of a newspaper article which had appeared several days previously. This motion was denied by the Court of General Sessions (MULLEN, J.) as was the renewal of the motion on November 9, 1955, the first day of the trial (24, 109-22, 138-40; see Exh. "A" on motion p. 42).

(b) The trial

A motion for a special jury having been previously granted, the trial commenced on November 9, 1955 (61-8, 133-5). During the trial, which concluded with a verdict of guilty on December 2, 1955, twenty-six witnesses were called by the People and seven by the defense, and approximately 1200 printed pages of testimony was taken (29-30, 4521-7, index pp. iii-vi).

The evidence at the trial established that, in the early hours of the morning on July 23, 1952, the petitioner, the deceased, and one "Jumbo" Lancia were together at a bar on Columbus Avenue in Manhattan (872, 878-81, 899-903, 909-10, 962-4, 1623).

The deceased, known as "Poochy," had been a friend of the petitioner for some six years (1436, 1438-41). An argument ensued between the petitioner and Lancia, which was twice broken up by the deceased, much to the petitioner's annoyance (420-9, 910-32, 1719, 1732-6). When

the group separated, the petitioner hurried down the avenue to another bar, then back up to the deceased's apartment, where he kept a .45 calibre automatic pistol (587-8, 595-605, 608-31, 1225-7, 1246-57, 1262, 1426-33, 1480-9, 1511-21, see 2844-52).

A few minutes later, he was seen to return to the first bar, walking hurriedly, and holding his hands to his stomach (632-9, 948-59). Entering the bar, he silently approached the deceased from the rear and, pulling a gun from under his shirt, shot him on the left side of the head (1104-10, 1745-8, 2007-18). As the deceased fell to the floor, the petitioner made his exit from the premises (643-8, 1110, 2010-9).

The spent bullet, from a .45 calibre automatic pistol, was found by a policeman an hour later behind the bar (1541-5). The autopsy, performed the following day, established the cause of death as being from a bullet wound of the skull and brain, the shot having been fired from a gun held only "a few inches away" (545-55).

The petitioner's identity as the killer was established by a number of eyewitnesses to the crime and by other evidence tending in various degrees to confirm the conclusion of his guilt. In fact, he did not dispute very vigorously his responsibility for the homicide, and, among other matters, admitted ownership of a .45 calibre automatic at the time in question (2832-3, 2837-41, 2844-8, 2956-7).

The defense consisted of a claim of total amnesia and temporary insanity by reason of an alcoholically induced "blackout." Through his own testimony and that of three other witnesses, the petitioner contended that, owing to intoxication, he did not remember any events of that morning; and that, since receiving a head injury in his

youth, he had frequently experienced "blackouts" of this nature when he drank (2159-92, 2202, 2214-9, 2385-425, 2550-6, 2650-4, 2680-5, 2711-8, 2742-53, 2858-63).

In rebuttal, the People called nine witnesses. One of these, a detective, told of a statement by the petitioner—after his apprehension and while returning by train to New York—clearly referring to the events which transpired shortly before the shooting, and after his alleged "blackout" (3722-32). Two witnesses testified as to the petitioner's sobriety on the night in question (3388-427, 3572-98); three described his lack of intoxication in a 1946 robbery, during which he claimed to have been drunk (3029-89, 3113-46, 3191-218); and three others gave medical testimony about his mental state, refuting his claim of temporary insanity (3246-303, 3336-65, 3828-40, 3969-4033).

On December 2, 1955, the jury returned a verdict of guilty, and, after motions to set aside the verdict on various grounds had been denied, sentence was imposed on December 16, 1955 (4522-6, 4538-58, 4574-5).

(c) Subsequent proceedings

On appeal to the Court of Appeals of the State of New York, the petitioner, among other grounds, alleged that he was denied due process under the Fourteenth Amendment because he had not been granted a change of venue or an adjournment on the basis of unfavorable newspaper publicity precluding a fair trial; because the security precautions in the courtroom had created an atmosphere precluding a fair trial; and because of unfair and prejudicial cross-examination by the prosecutor, emphasized in his summation [*People* v. *Burke* (1956) 1 N. Y. 2d 876, Record on Appeal, Defendant's brief, pp. 40-51].

In the Court of General Sessions, the petitioner had not objected to the portions of the summation subsequently complained of, but had moved for a mistrial on the basis of one of the prosecutor's questions on cross-examination, and had moved on the date of sentence to set aside the verdict and for a hearing because of the courtroom security measures, which motions were denied (see 3019-21; 4365, 4383, 4541-59).

The judgment of conviction was unanimously affirmed by the Court of Appeals on July 11, 1956.

A stay of execution having been obtained from a judge of the Court of Appeals, the appellant, on September 5, 1956, petitioned the Supreme Court of the United States for a writ of certiorari. His petition alleged a violation of due process under the Fourteenth Amendment on the precise grounds urged in the Court of Appeals, namely, a denial of a fair trial because of prejudicial cross-examination and summation by the prosecutor, unfavorable newspaper publicity, and a prejudicial atmosphere created in the courtroom by the security measures therein (Certiorari petition, pp. 2-14).

Certiorari was denied by the Supreme Court on December 3, 1956 (*Burke* v. *New York*, 352 U. S. 931, 77 S. Ct. 233).

The Proceedings Below

By petition returnable January 25, 1957, the petitioner sought a writ of *habeas corpus* in the United States District Court for the Southern District of New York, claiming that his detention in Sing Sing prison was unlawful in that the underlying conviction had been obtained in violation of the Fourteenth Amendment (*Habeas Corpus* Petition, p. 8).

Although in slightly different form, this petition was, in substance, identical to the previous certiorari petition. In support of the claim of an unfair trial, it recited the newspaper publicity, the cross-examination and summation of the prosecutor, and the courtroom security measures (*id.*, pp. 2-9). The record on appeal to the New York Court of Appeals was incorporated by reference, and a hearing was also requested (*id.*, p. 9).

On January 25, 1957, the court below heard argument and received the record on appeal. At the request of the court, the stenographic transcript of the *voir dire* examination of jurors and alternates was also submitted.

The petition was denied, and a certificate of probable cause granted, on February 9, 1957. In its opinion, the Federal District Court (SUGARMAN, U.S.D.J.) found, preliminarily, that the due process questions raised in the petition had been determined by the New York Court of Appeals, and that no hearing was necessary since the record on appeal to that court was adequate for review [*United States ex rel. Burke* v. *Dunno*, 148 F. Supp. 498, 500 (S.D. N.Y. 1957)].

The contention of unfavorable newspaper publicity was examined and found to be insufficient to have created such an atmosphere of hostility as to preclude a fair trial (*id.*, pp. 500-1). In this connection, the court noted that the *voir dire* examination of jurors and alternates revealed that "full opportunity was accorded to and exercised by the relator" in ascertaining whether their judgment had been affected by adverse publicity (*id.*, 501-2). That it had not was apparent from the *voir dire* questioning, excerpts of which were set forth in the footnotes of the opinion (*id.*, pp. 502-3).

The court further found that the security measures adopted at the trial were not unreasonable in the light of the petitioner's background, and did not deny him a fair trial (*id.*, pp. 504-5).

Finally, the court found that the portion of the prosecutor's cross-examination attacked—questioning the relator as to a prior killing he was suspected of—was proper under New York law, and that neither these questions by the prosecutor nor his summation constituted a denial of due process (*id.*, pp. 505-7).

On appeal to the United States Court of Appeals, that Court unanimously affirmed the District Court's denial of the application for *habeas corpus*, adopting the lower court's opinions and conclusions as its own, and adding that certain admissions made by the petitioner to police officers, following his arrest, were not obtained by "trickery, coercion, of other unlawful means" [*United States ex rel. Burke* v. *Denno*, 243 F. 2d 835, 836 (2d Cir. 1957)].

POINT I

Habeas corpus was properly denied.

All of the contentions advanced below have also been urged by the petitioner in the New York Court of Appeals and this Court. The briefs of the People of the State of New York in these courts were submitted by the respondent in the proceedings below, together with a memorandum of law by the District Attorney of New York County. This memorandum, *inter alia,* specifically considered the petitioner's allegation of unfair summation by the prosecutor, a subsidiary aspect of the cross-examination issue, which had not theretofore been separately considered in the People's briefs.

These briefs and memorandum of law, which are to be submitted herewith, contain complete answers to the petitioner's contentions in the court below and, in the interests of brevity, the answers will not be repeated here. For the convenience of the Court, we list in the footnote below where those answers may be found therein.*

From the foregoing, it is clear that no violation of due process was made out by the petitioner in the court below, and that his petition was, therefore, properly dismissed.

***A. As to newspaper publicity**
N. Y. Court of Appeals brief, pp. 52-53
Cert. brief, U. S. Sup. Ct., pp. 6-7
(No. 264 Misc., Oct. 1956)

B. As to cross-examination and summation
N. Y. Court of Appeals brief, pp. 31-34
Cert. brief, U. S. Sup. Ct., pp. 8-10
(No. 264 Misc., Oct. 1956)
Memorandum, U. S. D. C., p. 6

C. As to courtroom security measures
N. Y. Court of Appeals brief, pp. 52-55
Cert. brief, U. S. Sup. Ct., pp. 7-8
(No. 264 Misc., Oct. 1956)

CONCLUSION

The order of the Court of Appeals should be affirmed.

Respectfully submitted,

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